OSGOODE HALL LAW SCHOOL | YORK UNIVERSITÉ UNIVERSITY

Osgoode Hall Law Journal

Volume 51, Issue 2 (Winter 2014)

Article 6

Who Writes? Gender and Judgment Assignment on the Supreme Court of Canada

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Abstract
This article poses the question: Now that women are receiving an increasing share of the seats on the Supreme Court of Canada (the Court), can we conclude with confidence that they have been admitted to full participation, with a mix of judgments—including the more significant decisions—that is fully comparable to their male colleagues? The author looks at the assignment of reasons for judgment on the Court over the last three chief justiceships, with specific reference to the relative rate of assignments to male and female judges. He finds that the male/female gap is more robust than ever, although he also identifies considerations that suggest that there may be factors other than gender alone that are at play.

Keywords
Judicial process; Women judges; Canada. Supreme Court; Canada

Who Writes? Gender and Judgment Assignment on the Supreme Court of Canada

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This article poses the question: Now that women are receiving an increasing share of the seats on the Supreme Court of Canada (the Court), can we conclude with confidence that they have been admitted to full participation, with a mix of judgments—including the more significant decisions—that is fully comparable to their male colleagues? The author looks at the assignment of reasons for judgment on the Court over the last three chief justiceships, with specific reference to the relative rate of assignments to male and female judges. He finds that the male/female gap is more robust than ever, although he also identifies considerations that suggest that there may be factors other than gender alone that are at play.

Cet article soulève la question suivante : alors que les femmes représentent aujourd'hui une proportion de plus en plus grande des juges de la Cour suprême du Canada, est-il possible d'affirmer, en analysant une brochette de jugements – dont ceux qui ont été les plus marquants – qu'elles sont désormais sur un pied d'égalité avec leurs collègues masculins? L'auteur examine les motifs assignés des jugements de la Cour sous ses trois derniers juges en chef, en étudiant plus particulièrement la proportion des assignations confiées aux juges masculins et féminins. Il constate que l'écart entre les hommes et les femmes est plus tenace que jamais auparavant, bien qu'il identifie également des éléments qui suggèrent que des facteurs autres que le sexe pourraient entrer en ligne de compte.

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I. INTRODUCTION

WHO SPEAKS FOR THE Supreme Court of Canada (the Court)? The Court exerts its influence—its power, if you will—through the words that explain and ground its decisions that send signals to the lower courts and link the immediate case to previous cases. But who writes those words? Five judges on the full court (or four on a seven-judge panel, or three on the increasingly rare five-judge panels) can decide the outcome of an appeal. However, except for a modest but persisting number of the anonymous unanimous "By the Court" judgments, the writing of the reasons for judgment is normally[1] attributed to a single judge. Although the outcome of the immediate case may not be of major interest to any save the immediate parties, the reasons provided for that outcome constitute the precedent that guides the lower courts, sending signals that encourage or discourage potential litigants. While the circulate-and-revise process adds a collegial element to this nominally solo effort, it is reasonable to assume that it makes a difference who does the writing. It is also reasonable to think that justices accept service on the Court with the thought that they will be doing some of that writing. For at least some of the caseload—the "plums" as distinct from the "lemons," to use

1. As my careful wording suggests, "normally" denies "always," and co-authored decisions—reasons attributed equally to two judges, or even more rarely three judges—have become rather more frequent in the last decade and a half. See Peter J McCormick, "Sharing the Spotlight: Co-authored Reasons on the Modern Supreme Court of Canada" (2011) 34:1 Dal LJ 165. I will discuss this development and how it bears on judgment delivery in Part IV(A), below.

the language of American academic discussions of opinion-assignment practices at the United States Supreme Court (the USSC)[2]—the writing of majority reasons is something actively desired, not grudgingly accepted, and its allocation therefore demands study.

The modern assumption seems to be that all the judges on the Court should share—perhaps roughly equally—the writing of judgments, although, as Gerard Magliocca points out, this was not always the case for the USSC, and it is not clear when that expectation emerged.[3] It is even less clear when and to what extent that expectation has come to be shared in Canada.[4]

This raises the empirical question of the extent to which judgment delivery is in fact shared on the Court, and derivatively, of which judges or groups of judges, if any, might be advantaged or disadvantaged by the distribution of the opportunities to write judgments.

Donald Songer recently suggested that female judges have been consistently disadvantaged, receiving fewer judgment assignments than their male colleagues, a tendency that surprisingly persists even now that the Chief Justice—who plays a significant but apparently not a pre-emptively strong role in the assignment of judgments—is a woman.[5] His assertion raises an important question about

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2. David Danelski is the iconic reference on this subject. See David J Danelski, "Assignment of the Court's Opinion by the Chief Justice" (Paper delivered at the Midwest Political Science Association Annual Meeting, Chicago, Illinois, April 1960), [unpublished]. A later version of the same ideas can be found in David J Danelski "The Influence of the Chief Justice in the Decisional Process" in Walter F Murphy & C Herman Pritchett, eds, *Courts, Judges, and Politics: An Introduction to the Judicial Process* (New York: Random House, 1961) 497.
3. Magliocca says "I'm not sure when the Supreme Court started distributing its opinion assignments evenly," but he answers his own question by saying that "[t]here was evidently a sea change in the Court's customs in the middle of the 20th century." See "Supreme Court Opinion Days" (21 June 2012), online: Concurring Opinions <http://www.concurringopinions.com/archives/2012/06/supreme-court-hand-down-days.html>.
4. See Peter J McCormick, "Share and Share Alike? Or Winner Take Most?: Judgment Assignment on the Modern Supreme Court of Canada" (Paper delivered at the Midwest Political Science Association Annual Meeting, Chicago, Illinois, 11 April 2013), [unpublished]. There I examine the allocation of reasons for judgment, concluding that there is a reasonably strong practice of sharing for at least the four most recent chief justiceships.
5. Comments by Donald Songer at session 45-12 of the Midwest Political Science Association, Chicago, Illinois, on 13 April 2012. It was my impression at the time that he was speaking about conclusions that were included in his recently published book, but the relevant chapter contains no such discussion. See Donald R Songer et al, *Law, Ideology and Collegiality: Judicial Behavior in the Supreme Court of Canada* (Montreal: McGill-Queens University Press, 2012) [Songer, *Law, Ideology and Collegiality*]. John Szmer, Robert Christensen and Susan W Johnson offer a similarly tantalizing (one-line) conclusion about female judges and judgment delivery. "Supreme Court of Canada Majority Opinion Assignment" (Paper delivered at the Midwest Political Science Association, Session 45-12, Chicago, Illinois, 13 April 2012), 16 [unpublished].

the participation of women in major social institutions from which they were until recently excluded. It is not a small thing for women to begin to share the membership of such institutions, nor is it a small thing for their share to rise towards equal numbers; but the critical question is the extent to which that representation involves full and equal participation in that institution, including its most important as well as its more routine activities. The ghost at the banquet is token representation: a place at the table, but less than a full role in what the people are at the table to accomplish. The implication is that the growing presence of women in our society's professions and major institutions may still be coloured by differential treatment and variable expectations, by invisible but real barriers of the sort often described as "glass ceilings." Songer's comment suggests that something of the sort may be true of the Court.

This article will treat Songer's assertion as its central hypothesis, and test it against empirical data. The hypothesis is that women have played a smaller part in the important activities of the Court than their share of the Court's membership would have led us to expect. One of those activities is the assignment and delivery of judgments (*i.e.*, majority reasons) of the Court, especially in more important cases. Testing this hypothesis presents some challenges in terms of what to count and how to count it. I will first deal with these methodological questions in order to examine, in turn, the three chief justiceships (Chief Justices Dickson, Lamer, and McLachlin), for which women have made up a meaningful component of the Court's membership.[6] I will draw conclusions from the full period of the three chief justiceships as to whether or not female judges have become full participants. Essentially, my findings will corroborate Songer's hypothesis, particularly in the case of the more important decisions (a narrowing of focus not addressed by Songer). I will also explore an additional factor that needs to be considered in order to reach the appropriate and precise description of the status of female judges on the Court: I call it the "Chief Justice factor."

II. ASSIGNING THE JUDGMENT

I start this Part with a brief summary of the current literature on the judgment assignment process of the Court. I draw upon the very parallel accounts provided

6. It would not be useful to extend the analysis to the Laskin Court; although Justice Wilson became the first female to serve on the Court while Chief Justice Laskin was still Chief Justice, she served for only the last three and a half months of his decade plus as Chief Justice.

by Ian Greene,[7] Songer,[8] Cynthia L. Ostberg and Matthew Wetstein,[9] as well as Justice Bertha Wilson's comments more than twenty years ago.[10]

After oral arguments, the judges meet in conference for a brief sharing of views during which a majority sense, a "feeling of the mood of the Court," emerges, and usually one of the justices will volunteer to take on the responsibility of being the lead author for a set of majority reasons that will go through a process of circulation, comment, revision, and recirculation. If more than one justice volunteers, the more senior justice prevails. There is no suggestion that someone—amongst the other justices in the majority or the Chief Justice—resolves this by reference to a broader sense of which judge best reflects the "mood of the Court." Nor do I see any explicit mention of an expectation of equal sharing, although as I have concluded elsewhere, there does seem to have been such an ethic in play for some time.[11] Absent a volunteer, the Chief Justice will suggest that a specific justice might volunteer. If that person demurs, the Chief Justice will assign the judgment.

This description presents a fascinating mixture of the collegial and the hierarchical, a splendid operational counterpart to the effectively self-negating "first among equals" that we typically use to describe the chief justiceship itself, but with its own additional wrinkle. On the one hand, individual judges volunteer, either as part of the cycle of discussion at conference or immediately at the end of conference once consensus has emerged or the divisions have revealed themselves. In the event that multiple judges volunteer, the tie is broken in favor of seniority, with the Chief Justice automatically being the most senior, and the others ranked by the date of their appointment. On the other hand, should this not happen, the Chief Justice asks a specific justice if he or she will volunteer. If the judge refuses to volunteer, the Chief Justice assigns the judgment.

Apparently (I find no indication to the contrary), the Chief Justice's role is not affected by whether or not he or she voted with the majority.[12] My assumption is that where the Chief Justice does not serve on a particular panel, his or her role

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7. Ian Greene et al, *Final appeal: decision-making in Canadian courts of appeal* (Toronto: James Lorimer & Company Ltd, 1998).
8. *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) [Songer, *Transformation*]; Songer, *Law, ideology and collegiality*, *supra* note 5.
9. *Attitudinal decision making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007).
10. "Decision making in the Supreme Court" (1986) 36:3 UTLJ 227.
11. See *supra* note 4.
12. This is not a small matter—Chief Justices may be less likely to be writing or joining minority reasons than many of the other justices on the Court, but they still do more than 10 per cent of the time, a consideration that looms larger if we assume that the more important cases are more likely to elicit disagreement.

is played by the most senior justice. At the end of the day, through a process more spontaneous than steered, the assignment of judgments should lead to a fair sharing of the work and a reasonable partition of the opportunities to influence the development of judicial doctrine. The contrast with the relatively straightforward "assigned by the senior justice within the majority" of the USSC[13] is striking. One of the implications of the Canadian model is that we cannot clearly attribute responsibility for whatever we might find, good or bad, in the judgment delivery patterns. Another implication is that we cannot suggest how, or by whom, any problem (should one be detected) might be fixed.

I cannot find any real discussion in the literature about the patterns that result from these judgment assignment practices except for Songer's passing comments relating to seniority,[14] and my own earlier (and now very dated) musings.[15] I would, therefore, like to explore this question, focussing on the relative participation rates of various judges, especially the female judges. As I suggested earlier in this Part, I cannot draw any conclusions as to the relative impact on these patterns of the various factors involved: simple diffidence; being out-ranked in terms of seniority (or in the case of "swing" judgments[16] simply being "out-persuaded"); or of Chief Justice leadership, either heavy-handed or subtle.

III. DESCRIBING THE APPROACH

My primary data are simply the number of judgments delivered by each of the members of the Court during each of the three chief justiceships. I have drawn this information from a database for all Court decisions since 1949.[17] While some judges—by definition the Chief Justice himself or herself, but usually one or more other judges as well—have served for the entire period of

13. See *e.g.* Forrest Maltzmann & Paul J Wahlbeck, "A Conditional Model of Opinion Assignment on the Supreme Court" (2004) 57:4 Pol Research Q 551. The article begins with the statement: "The chief justice's power to assign the majority opinion on the U.S. Supreme Court provides an indispensable agenda-setting tool for the chief."
14. Songer, *Transformation, supra* note 8 at 126-31.
15. Peter McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993" (1994) 5 Sup Ct L Rev (2d) 499.
16. "Swing judgments" are those for which the initial assignee of the majority reasons has lost the majority and wound up writing minority reasons. See Peter J McCormick, "'Was it Something I Said?': Losing the Majority on the Modern Supreme Court of Canada, 1984-2011" (2012) 50:1 Osgoode Hall LJ 93.
17. The Manitoba Legal Research Institute and the Alberta Law Foundation funded the initial work on this database. I am grateful to Professor Alvin Esau of the University of Manitoba, who strongly encouraged me to undertake this data collection project and commented helpfully on the initial design.

each Chief Justice, the membership of the Court undergoes a constant process of replacement and renewal. The Dickson Court saw six new appointments (including the replacement for the previous Chief Justice); the Lamer Court likewise six; and the McLachlin Court, at time of writing, has seen no fewer than ten. The simple count of reasons for judgment, then, can only be a basis for reasonable comparison if it is crossed back against the years of service to generate a "judgments per year" count for each member of the Court.

But this already points to the need for a first refinement of the data: This count is misleading because the Court caseload continues to include a non-trivial number of oral, from-the-bench, decisions (*i.e.*, cases that are not reserved for judgment but are decided on the day of hearing). These are typically appeals by right, usually heard by minimum five-judge panels, and normally dismissed by reasons of a single paragraph (sometimes a single sentence) in length, and almost always delivered by the most senior member of the panel.[18] These numbers can be considerable. For example, during the Lamer Court decade they made up about 30 per cent of the total caseload. Today they still make up a more modest one-ninth of the caseload of the McLachlin Court—but if the focus of this investigation is to be on the more substantive, researched reasons for judgment that may have an effect as precedent on future cases, then the inclusion of from-the-bench decisions will distort the results. I have, therefore, excluded them from consideration; my count is of the authorships of reasons for judgment on reserved decisions.

A second refinement is that, for the purposes of analysis, I have divided the chief justiceships not in terms of the date on which judgments were delivered, but rather the dates on which oral arguments were heard. This division has a double utility. First, it means that new judges are not waiting for a year or so as "old" decisions finish their cycle through the draft-and-circulate phase before their own panel participation begins to generate substantive decisions. Using the obvious decision delivery date would underestimate the participation of new judges by misleadingly inflating their length of service. Second, it means that judgments delivered by Chief Justices after their retirement (during the six months that the *Supreme Court Act*[19] allows them to wind up their reserved decision participation) are assigned to their chief justiceship, not the new one. For example, given that Chief Justice Dickson's judgment in *R v Keegstra*[20] was not delivered until the middle of December 1990, five and a half months after his retirement,

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18. The presentation of such reasons is so pro forma that sometimes the senior justice delivers reasons that announce the outcome while reporting his or her own dissent from the decision.
19. RSC 1985, c S-26.
20. [1990] 3 SCR 697, 124 DLR (4th) 289.

using decision delivery date rather than oral argument date would mean that the single most frequently cited decision of the Lamer Court had been delivered by Chief Justice Dickson, which is to say, by a judge who was not in any serious sense a member of the Lamer Court. Similarly, Chief Justice Lamer's decision in *R v Proulx*,[21] handed down almost a month after Justice McLachlin became Chief Justice, would have placed in the top ten most frequently cited decisions of the McLachlin Court. This is only the most dramatic demonstration of the fact that for the first few months after the appointment of a new Chief Justice, the decisions delivered on reserved judgments are necessarily the product of the decision assignment dynamics of the previous chief justiceship. Any change in those dynamics can emerge only with the judgment assignments that occur on the new Chief Justice's watch.

A third refinement of the data recognizes that not all Court decisions are equally important. Granted, all are important enough that the litigant thought it worth the bother, the expense, and the investment of time to bring the matter before the highest court. Granted as well, it is usually the case that the Court also indicated a presumption of a certain level of importance by granting leave to appeal (a hurdle that most such applications do not manage to clear). However, some cases raise much more major issues, and some do (while others do not) resolve issues in such a powerful and persuasive way as to impact the Court's decisions for some time. My mechanism for distinguishing the more important from the less important cases is to let the Court do the selecting for me: I will take it that the more important cases are the ones that are cited more often in subsequent decisions of the Court itself. "Important enough to cite" is the relevant hurdle, and how often a specific decision clears that hurdle is an objective indicator that can be used to rank the decisions. The numbers here derive from a database of all citations to judicial authority in Court decisions since 1970, including citations in minority reasons as well as in judgments of the Court.[22]

Why are some cases cited while others are not? The most obvious factor is the enduring importance of the issue (or issues) that the case in question resolves, and the most obvious example makes the point: *R v Oakes*.[23] This Dickson Court decision that set the test for applying the "reasonable limits" clause of section 1 of the Canadian *Charter of Rights and Freedoms*[24] is as far as I can determine the most frequently cited Court decision of all time, its utility deriving from the frequency with which section 1 arguments figure as an element within a *Charter* case.

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21. 2000 SCC 5, [2000] 1 SCR 61.
22. The Social Sciences and Humanities Research Council funded the initial work on this database, and I am grateful to them for their support.
23. [1986] 1 SCR 103, 24 CCC (3d) 321.
24. *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

A second factor would be how solidly and effectively the decision in question resolves the issue, and how well it continues to satisfy the expectations and the needs of the judges who deal with variations of the central issue over time. A third factor would be the reputation of the judge in question (as Richard A. Posner has pointed out,[25] citation is simultaneously a measure, and a possible source, of prestige). A final factor would simply be the luck of the draw: An issue may prove to have more lasting salience, and a solid decision on the matter may therefore prove to have "longer legs," than might have been anticipated when the decision was handed down. Since some mixture of immediate salience, merit, expertise, reputation, and luck combines to generate the numbers, the frequency of citation certainly cannot be treated as a function of merit *simpliciter*, and I hazard no guess as to how much each factor matters.

To be sure, frequency of citation is not a perfect indicator of importance. There are cases that are clearly important, but in such a way that they do not trigger subsequent citation to any unusual extent; an example might be the *Reference re Secession of Quebec*,[26] which is well down the citation frequency list for the Lamer Court despite its unquestionable importance on a number of dimensions. On the other hand, there are certain recurring issues (*e.g.*, standards of review and rules of statutory interpretation) that are very important to the Court, such that problem-resolving decisions on these matters (*e.g.*, *Rizzo & Rizzo Shoes Ltd (Re)*[27] and *Housen v Nikolaisen*[28]) draw a steady string of citations, even though they would not loom large in the eyes of many commentators and might go unrecognized by any broader public. Even so, I think citation frequency is a reasonable surrogate for at least one major dimension of the importance of judicial decisions, and I will use it for each of the three chief justiceships in turn. Specifically, for each chief justiceship I will generate numbers first for the overall distribution of reserved judgments, and then for a "top tenth" of the Court's decisions. I define the top tenth as the 10 per cent of reserved judgments receiving the highest number of subsequent citations by the Court itself.

For two reasons this methodology requires a division into chief justiceships, rather than treating the "women on the Supreme Court" period as a single block of data. First, the caseload of the Court—and more specifically the caseload of decisions reserved for judgment—has been sliding gradually downward even while panel sizes have been sliding upward. "Average reserved judgments per judge per year" is, therefore, a moving target, lower for the Lamer Court than for the

25. *Cardozo: a study in reputation* (Chicago: University of Chicago Press, 1990).
26. [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*].
27. [1998] 1 SCR 27, 154 DLR (4th) 193.
28. 2002 SCC 33, [2002] 2 SCR 235.

Dickson Court, and lower again for the McLachlin Court. The squeeze applies to, and is even more significant for, the top tenth decisions; as we move through the three Courts, there are progressively fewer of these to go around. Second, the accumulation of citations by any judgment, once it has been delivered, is largely a function of time, the differential impact of which is better contained by treating each chief justiceship as a separate block (although the citation accumulation of McLachlin Court decisions presents a special challenge that I will deal with below, in Part IV(C)). Ultimately, my concern is to track the evolution of these patterns rather than to treat them as a single flat aggregate, and the division into chief justiceships better serves this temporal dimension.

IV. THE THREE COURTS

A. THE DICKSON COURT

Chief Justice Dickson served on the Court in that capacity for just over six years, from April 1984 to July 1990. Table 1 briefly summarizes the service of the fifteen judges who served for all or part of his chief justiceship.

TABLE 1: JUDGMENT DELIVERY PARTICIPATION BY JUDGE: THE DICKSON COURT

	Service in Years	Decisions Delivered	Decisions Per Year	Top Tenth Decisions	Top Tenth Per Year	Ratio to All Judges
Lamer	6.20	66.33	10.6	11.33	1.83	208%
Dickson CJ	6.20	56.83	9.3	10.83	1.75	199%
McLachlin	1.25	20	16.0	2	1.60	181%
La Forest	5.45	49.5	9.1	8.5	1.56	178%
Wilson	6.20	54.33	8.7	5.33	0.86	98%
Gonthier	1.40	16	11.4	1	0.71	81%
Le Dain	4.51	27	6.0	3	0.67	76%
McIntyre	4.83	43	8.9	3	0.62	71%
Sopinka	2.10	29	13.8	1	0.48	54%
Estey	4.01	15	3.7	1	0.25	28%

Beetz	4.56	22	4.8	1	0.22	25%
L'Heureux-Dubé	3.21	18	5.6	0	0	
Chouinard	2.80	16	5.7	0	0	
Cory	1.41	22	15.6	0	0	
Ritchie	0.54	0	0	0	0	
By the Court		51		2		

The fractions of a judgment might seem curious, but they reflect a judgment-delivery practice that was most unusual on the Dickson Court, but emerged more strongly in the middle of the Lamer decade and has continued to increase since that time.[29] That practice is the co-authorship of reasons, with two (much more rarely three) judges jointly indicated as lead authors of a set of reasons. During the Dickson Court, Chief Justice Dickson and Justice La Forest co-authored the judgment in *R v Sparrow*,[30] while Chief Justice Dickson, Justice Lamer, and Justice Wilson jointly authored the reasons in *Irwin Toy Ltd v Québec (Attorney General)*.[31] The only reasonable way to present the results of this practice is through the fractional sharing of the reasons, which is what I have done in Table 1.

Leaving out the fifty-one By the Court judgments, the overall average was 8.3 decisions per judge per year. Among the female judges, Justice Wilson was slightly above this, Justice McLachlin (as she then was) on rather short length of service doubled it, and Justice L'Heureux-Dubé was well below. The very low numbers for Justice Estey reflect the fact that for a full term (1985–86) he was seconded from the Court to conduct an inquiry into the failure of two western Canadian banks; and the low numbers for Justice Beetz are presumably the result of the health concerns that led him to leave the Court well before the mandatory retirement age.

The real question with respect to the sharing of judgments relates to the allocation of the more important decisions, which I have chosen to operationalize in terms of the frequency of subsequent citation: The most important decisions for present purposes are those that are cited more often by the Court itself in

29. See *supra* note 1.
30. [1990] 1 SCR 1075, 70 DLR (4th) 385.
31. [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*].

subsequent years. Since the Dickson Court heard oral argument and reserved for judgment a total of 506 cases, my top tenth isolates the fifty most frequently cited decisions.[32] For the counts below, two of these drop out because they were By the Court decisions whose authorship was not attributed to any specific judge or judges on the panel. For purposes of illustration, Table 2 lists the top dozen cases, all of which have been cited ninety times or more.

TABLE 2: MOST FREQUENTLY CITED DECISIONS OF THE DICKSON COURT

Case	Citation	Delivered by	Times Cited
R v Oakes	[1986] 1 SCR 103	Dickson CJ	240
R v Collins	[1987] 1 SCR 265	Lamer	138
Irwin Toy Ltd v Québec	[1989] 1 SCR 927	Dickson CJ, Lamer & Wilson	136
Re BC Motor Vehicle Act	[1985] 2 SCR 486	Lamer	135
R v Edwards Books and Art Ltd	[1986] 2 SCR 713	Dickson CJ	114
Mills v The Queen	[1986] 1 SCR 863	McIntyre	105
Slaight Communications Inc v Davidson	[1989] 1 SCR 1038	Dickson CJ	101
Law Society British Columbia v Andrews	[1989] 1 SCR 143	Wilson	93
Reference Re Public Service Employee Relations Act (Alberta)	[1987] 1 SCR 313	Le Dain	92
R v Lyons	[1987] 2 SCR 309	La Forest	91
R v Keegstra	[1990] 3 SCR 697	Dickson CJ	91
Thomson Newspapers Ltd v Canada	[1990] 1 SCR 425	La Forest	90

Recalculating judgment participation on this smaller set of fifty cases generates the right-hand columns in Table 1. The implication of choosing the top tenth is that the overall ratio of all cases to important cases is ten to one, but this expectation does not predict the ratios for very many of the individual justices. (Interestingly, the three judges for whom this ratio does hold—Justices McLachlin, Wilson, and Le Dain—include two of the three female judges on the Dickson Court.) The "Top Tenth Per Year" column is the one that drives the ordering of names in Table 1, and is therefore implicitly some sort of "league

32. My top tenth does not isolate the top fifty-one because there was a six-way tie for fifty-first.

table" for the Court's sharing of the delivery of important decisions, prorated against length of service. For simplicity of comparison, and especially to facilitate comparisons between the chief justiceships, the final column expresses "Top Tenth Per Year" as a percentage of the all-judge average figure.

Table 1 strongly suggests that the Dickson Court's most important jurisprudence was dominated by the Dickson-Lamer-La Forest trio, who, between them, delivered thirty of the fifty most frequently cited decisions. They are joined in some sense by Justice McLachlin (as she then was), although this is based on a much shorter period of service. After this set of judges, there is a sharp drop-off in the frequency of significant judgment delivery, so much so that this split can be taken as a major dynamic within the decision delivery process for the Dickson Court.

Table 1 also permits the accumulation of judgment delivery data for male and female judges as a group, and Table 3 presents these data.

TABLE 3: JUDGMENT PARTICIPATION BY MALE AND FEMALE JUDGES: THE DICKSON COURT

	Service in Years	Decisions Delivered	Decisions Per Year	Top Tenth Decisions	Top Tenth Per Year
All judges	54.68	455	8.32	48	0.88
Male judges	44.02	363	8.25	40.67	0.92
Female judges	10.66	92	8.63 [104.7%]	7.33	0.69 [74.4%]

Overall, female judges delivered slightly more than their notional share of the total judgments of the Court: about 5 per cent per judge per year higher than that of their male colleagues. There are two ways to think about this apparent over-share. The first is simple proportionate increase: More decisions per year means more opportunities to deliver more of the important decisions per year, just as buying more tickets means a better chance of winning the lottery. The other is off-setting compensation—sharing the workload by giving one set of people a larger number of smaller cases, and the other a smaller set of larger cases. The latter is what seems to have happened. An over-share for female judges of 5 per cent on all judgments accompanied a 25 per cent under-share of the top

tenth of frequently cited decisions. This was already signalled by the fact that the top dozen cases listed in Table 2 include decisions written by only one female judge, Justice Wilson: one judgment of her own (*Andrews v Law Society of British Columbia*[33]), and one shared with Chief Justice Dickson and Justice Lamer (as he then was) (*Irwin Toy*) in a then unusual co-authorship. As a group, men accumulated four times as many years of service as women, but they delivered more than eight times as many of the top dozen cases, and more than five times as many of the top tenth.

Part of the explanation may lie in the fact that female judges were more likely than their male counterparts to write or to join minority reasons (either dissents or separate concurrences, both of which were becoming more frequent for the Dickson Court than they had been for the preceding Laskin Court), an action that obviously means that they cannot be writing the majority judgment. Women wrote or joined minority reasons in just over 25 per cent of all their panel appearances, compared with 15 per cent for the men. Interestingly, this did not have the effect one might have anticipated on the writing of judgments overall. Years ago, Elliot E. Slotnick suggested that judges who frequently write minority judgments often pay a double penalty for their waywardness.[34] First, they are less often within the majority for the assignment of majority reasons; and second, even when they are within the majority, they receive somewhat less than their notional share as an apparent implicit outsider tax. At least for the overall judgment numbers, precisely the opposite seems to have been the case on the Dickson Court: Women receive a more than off-balancing share of the assignments on those occasions when they are part of the majority, so that one would not guess from those numbers alone that disagreeing with the majority was a moderately disproportionate feature of their panel participation. But this offsetting appearance vanishes for the top tenth of decisions. Not only does the appearance of a policy of offsetting assignments vanish, but also the difference in the rate of important judgment delivery is almost exactly double the difference in panel-majority voting participation. On this more focused sample, perhaps there is something to the Slotnick thesis after all.

The Dickson Court was the first chief justiceship in our history that included several female judges who contributed significantly to the Court's reasons for judgment. Yet it is demonstrably the case that overall, these female judges were less likely than their male counterparts to deliver the more important (*i.e.*, more

33. [1989] 1 SCR 143, 56 DLR (4th) 1.
34. "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger" (1979) 23:1 Am J Pol Sci 60 at 63.

frequently cited) judgments of the Court. On a per judge per year basis, female judges were only 73 per cent as likely as male judges to deliver those significant decisions, and the list of the top twelve cases in Table 2 suggests that this factor applied even more strongly at the upper levels of that significance.

B. THE LAMER COURT

Antonio Lamer became Chief Justice in July 1990 and his chief justiceship coincided almost perfectly with the decade of the 1990s. As with the Dickson Court, there was a steady rate of turnover. Table 4 provides judgment delivery information for the fourteen judges of the Lamer Court, paralleling the information in Table 1 above.

TABLE 4: JUDGMENT DELIVERY PARTICIPATION BY JUDGE: THE LAMER COURT

	Service in Years	Decisions Delivered	Decisions Per Year	Top Tenth Decisions	Top Tenth Per Year	Ratio to All Judges
Arbour	0.31	6	19.4	1	3.23	402%
Iacobucci	8.52	82.33	9.7	11	1.29	161%
Lamer CJ	9.52	80.5	8.5	12	1.26	157%
La Forest	7.25	48	6.6	9	1.24	155%
Bastarache	2.27	17.33	7.6	2.5	1.10	137%
Cory	8.92	102.33	11.5	9.5	1.07	133%
Sopinka	7.40	68	10.5	7	0.95	118%
McLachlin	9.52	76.5	8.0	8	0.84	105%
L'Heureux-Dubé	9.52	44	4.6	5	0.53	65%
Major	7.15	45	6.3	1	0.14	17%
Gonthier	9.52	49	5.2	1	0.11	13%
Binnie	1.43	15	10.5	0	0	
Wilson	0.51	2	3.9	0	0	
Stevenson	1.63	9	5.5	0	0	
By the Court		22		1		

While the Dickson Court delivered only two co-authored decisions, the Lamer Court gave twenty-nine (twenty-eight double-authored, and one triple-

authored), hence the fractions (halves and thirds) in the count of decisions delivered. The average number of decisions per judge per year (omitting the twenty-two By the Court decisions) for all judges is 7.85, down about half a decision per year from the Dickson Court. Although the total caseload of the Lamer Court is higher than that of the Dickson Court, the larger number of from-the-bench decisions means that the reserved caseload has actually gone down.

Again, a female judge (this time Justice Arbour) stands near the top of Table 4 (in fact, she tops it), but this is based on less than half a year of service. A female judge (Justice Wilson) is also found near the bottom of the table, with similarly short service at the end of her career on the bench.

As with the Dickson Court, I have used citation counts to identify the most important of the Lamer Court decisions; since there were 677 cases reserved for judgment during the Lamer decade, the top 10 per cent of the decisions include the sixty-eight most frequently cited decisions, and the cut-off was twenty-four citations. Table 5 below lists the thirteen most frequently cited decisions of the Lamer Court (thirteen because of the two-way tie for twelfth place).

The much lower citation count for the Lamer Court is striking: The most frequently cited decision of the Lamer Court would not displace the twelfth most cited decision of the Dickson Court. I think the major explanation for this is the obvious one, which is that the Dickson Court was delivering the "first generation" of major *Charter* decisions, as that addition to our constitution worked itself into the legal fabric of the country. (All of the top dozen Dickson Court decisions are *Charter* cases). There is another contributing explanation: The Dickson Court decisions by definition had another decade to accumulate citations, but—as I will explain in Part IV(C), below—the attrition rate for citation frequency makes this a smaller factor than one might expect. In any event, since the comparisons in terms of citation count are being made within rather than between chief justiceships, this does not compromise the present enquiry.

TABLE 5: MOST FREQUENTLY CITED DECISIONS OF THE LAMER COURT

Case	Citation	Delivered by:	Actual Cites
Dagenais v Canadian Broadcasting Corp	[1994] 3 SCR 835	Lamer CJ	89
R v Seaboyer	[1991] 2 SCR 577	McLachlin	78
Rizzo & Rizzo Shoes Ltd (Re)	[1998] 1 SCR 27	Iacobucci	74

R v Stinchcombe	[1991] 3 SCR 326	Sopinka	61
R v O'Connor	[1995] 4 SCR 411	L'Heureux-Dubé	60
Schachter v Canada	[1992] 2 SCR 679	Lamer CJ	60
RJR-MacDonald Inc v Canada	[1995] 3 SCR 199	McLachlin	59
Baker v Canada	[1999] 2 SCR 817	L'Heureux-Dubé	52
Law v Canada	[1999] 1 SCR 497	Iacobucci	52
Canada v Southam Inc	[1997] 1 SCR 748	Iacobucci	49
Egan v Canada	[1995] 2 SCR 513	La Forest	49
Vriend v Alberta	[1998] 1 SCR 493	Cory & Iacobucci	47
R v Butler	[1992] 1 SCR 452	Sopinka	47

Table 5 identifies the most frequently cited decisions of the Lamer Court (thirteen decisions are listed because of a two-way tie for twelfth place). The authors of the most frequently cited decisions are a more diverse group than was the case for the corresponding set of major cases from the Dickson Court. Only Justice Iacobucci appears on the list for more than a pair of cases. No fewer than five judges have at least two decisions in this top thirteen (and five different judges author the top five decisions[35]), and two of those five (Justices McLachlin and L'Heureux-Dubé) are female judges. While Chief Justice Dickson and Justice Lamer (as he then was) dominated the top cases list in the Dickson Court, the Lamer Court differs: There is no comparable dominant pair or trio.

Recalculating on the reduced set of sixty-eight decisions (further reduced to sixty-seven because one of them—the *Secession Reference*—was a By the Court decision) generates the figures in the right-hand columns of Table 4. Once again, three judges (Justices Cory and Iacobucci, and Chief Justice Lamer) combine for exactly half of the top tenth of the most frequently cited decisions, although the appearance of a dramatic separation between the top handful and the others is rather less in evidence than was the case for the Dickson Court. As with the

35. The tie is thus broken between *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235, and *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1, in favor of the former, on the grounds that it had three fewer years to accumulate the sixty citations.

previous Part, I use the data in Table 4 to accumulate separate counts for the male and female judges, and this is shown in Table 6.

TABLE 6: JUDGMENT PARTICIPATION BY MALE AND FEMALE JUDGES: THE LAMER COURT

	Service in Years	Decisions Delivered	Decisions Per Year	Top Tenth Decisions	Top Tenth Per Year
All judges	83.47	655	7.85	67	0.80
Male judges	63.61	526.5	8.28	53	0.83
Female judges	19.86	128.5	6.47 [78.2%]	14	0.70 [84.6%]

The initial indications were promising, to the extent of suggesting a possible refutation of the Songer thesis: female judges authored four of the thirteen most frequently cited decisions (two by Justice McLachlin, as she then was, and two by Justice L'Heureux-Dubé). This is just under one third of the major cases, although female judges accounted for less than one quarter of the total years of service. However, this is not sustained by the wider count. On a per judge per year basis, female judges delivered less than 80 per cent as many decisions in total, and less than 85 per cent as many of the major decisions. In one important respect, this reverses a pattern from the Dickson Court, where female judges delivered more than their notional share of total judgments but less than their notional share of major judgments. On the Lamer Court, female judges' share of major judgments is slightly higher than their share of total judgments. Significantly, the "per judge per year" factor for women narrows the gap with their male colleagues: below 75 per cent in the Dickson Court, it is slightly under 85 per cent in the Lamer Court. But to make the obvious point, it is still lower than for male judges, and this disparity is all the more striking for the fact that it persists over two chief justiceships totaling more than fifteen years and including four different female judges with a combined total of thirty years of service.

Once again, on the Lamer Court as on the Dickson Court, female judges were more likely to be writing or joining minority reasons. Male judges wrote or joined minority reasons in less than one-fifth of all their panel appearances (up from about one-sixth for the Dickson Court), whereas female judges did so in just under one-third of theirs (up from one-quarter for the Dickson Court). To put it differently, female judges were only 80 per cent as likely as their male counterparts to join the judgment-delivering majority on a Court panel, which makes it less surprising that they were only 85 per cent as likely to deliver the reasons for judgment. In Slotnick's terms, female judges still seemed to suffer from the single penalty of not being as frequently on-side with the majority (although on the Lamer Court, unlike the Dickson Court, there was no appearance that this

was off-set by skewed assignments overall), but not the double penalty of also being pushed back further in the queue for dissenting more often. If the "first look" explanation of the figures from the Dickson Court is that women received their share of total cases but less than their share of major cases for the delivery of majority reasons, the corresponding "first look" explanation of the figures for the Lamer Court is that female judges paid the price for their more frequent participation in dissents and separate concurrences.[36]

C. THE MCLACHLIN COURT

An obvious initial problem needs to be overcome before this article can proceed to an analysis of the McLachlin Court that parallels those of the preceding two chief justiceships. That problem is that the McLachlin Court is, first, much more recent, and second, still ongoing. Recency suggests that none of the decisions have had enough time to accumulate the full citation count that would rank them appropriately. The fact that the Court is still ongoing means that this ranking challenge applies very unevenly across the decade-plus, in that the early decisions have had up to a dozen years to be cited while the more recent decisions have had only weeks or months. I think that this problem is at least partially solvable (for eleven years of decisions, if not for the full thirteen), and I will explain why and how in this Part.

Between 7 January 2000 and 31 December 2012, the McLachlin Court made 11,471 citations to previous decisions of the Court. For each of those citations, I have calculated the "age" of the cited case at the time of citation—*i.e.*, the date of decision delivery subtracted from the date of its subsequent citation—and then counted the number of citations for the first year after decision delivery, and the second year, and so on. There were 795 citations to cases handed down less than a year previously, 590 citations to cases more than one but less than two years old, 553 citations to cases more than two but less than three years old, and so on down to the thirteen that were more than thirty-nine but less than forty years old. This count is displayed below, in Figure 1, in the slightly jagged line.

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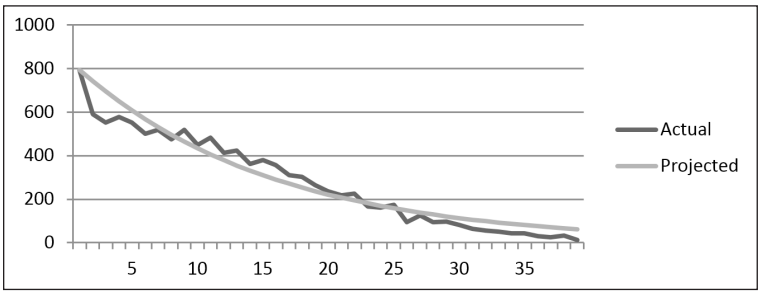
36. Of course, the arrow of causation could just as likely be running the other way. It could be that the reason that female judges dissented or separately concurred more often is that they were being excluded from their notional share of the judgments, especially the significant judgments, and the alternative to writing minority reasons was silence.

FIGURE 1: AGE OF CITATIONS AT TIME OF CITATION: MCLACHLIN COURT [2000–12]



This pattern is far from a random walk; it shows a continuous decline, a strong tendency for cases to be cited less often as they get older. The line is not straight but curved. As a result, it must be possible (using a "least sum of squares"[37] test) to identify the line that best matches the actual numbers. This is shown by the second (smooth) line on Figure 1, which reflects a steady 6.5 per cent depreciation rate from the initial value of 795. On the empirical evidence of the first thirteen years of the McLachlin Court, its use of "older" cases decays by a constant 6.5 per cent, such that five-year-old cases are cited only 93.5 per cent as often as four-year-old cases, and ten-year-old cases are cited only 93.5 per cent as often as nine-year-old cases, and so on.[38]

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37. The "least sum of squares" test can be explained as follows: A set of data points in the real world is always slightly scattered, so the actual line is a wiggly mess. The aim is to find the formula-generated line that best represents these points. From observation, one can see that the line in question is not a straight line but looks more like a standard decay curve. A possible equation looks at the line (i.e., the series of predicted data points) that would represent a constant decay of X per cent from the starting point, such that point 1 is "starting point times (1-X)," point 2 is "starting point times (1-X) squared," and point 3 is "starting point times (1-X) cubed," and so on for as many data points as may have been accumulated. The fit is measured by calculating the value of "predicted point 1 - actual point 1" and squaring it. We do the same for "predicted point 2 - actual point 2," and so on for all the data points. We calculate the total value of all the squares of these differences, which winds up being a rather large number that has no meaning in itself except as a comparison point. Subsequently, we repeat the process for a different value of X, then for a third, then for a fourth, adjusting that value continuously to generate the smallest possible total sum of squares. This line is now the best fit to the actual set of data points, an objectively and demonstrably better answer to "what equation can be used to generate this line?" than any possible alternative value for X. The decay rate that I indicate is the result of this process applied to the "actual count" numbers in Figure 1.
38. See Peter McCormick, "What Supreme Court Cases Does the Supreme Court Cite?: Follow-Up Citations on the Supreme Court of Canada, 1989-1993" (1996) 7 Sup Ct L Rev

This comment about the Court is generally true of judicial citation practices—an idea first suggested by William M. Landes and Posner almost forty years ago.[39] Much more recently, Ryan C. Black and James F. Spriggs II (speaking of the USSC) describe as "a well-established empirical regularity" the idea "that Supreme Court precedents experience depreciation, whereby cases are generally less likely to be cited as they become older."[40] Constant and mathematically precise reductions in citation frequency are a general feature of judicial citation.

If this is the case, we must be able simply to turn the figure around, and use it to predict citation frequencies for the cases that the McLachlin Court itself is handing down, and whose citation frequency patterns will follow the same dynamic at the hands of the McLachlin Court and its successors. Looking backward, the line reports the impact of recency on citation frequency. Looking forward (and turning the *y*-axis into percentages rather than hard numbers), it projects over time the number of citations per year for any case or set of cases. Under the same logic, the area under the curve is the total number of citations that will have been accumulated after any selected number of years. If we know how many times a case has been cited in, say, five years—in other words, if we know the area under the curve for that part of the graph—then we can project a count of how often it will be cited in ten years, or twenty, or fifty, and so on.[41]

For present purposes, I will limit myself to using the first thirteen years of the McLachlin Court to accumulate citations, but only using cases from the first eleven years to drive an analysis that parallels that of the earlier courts (*i.e.*, I will not be making any projections based on less than two full years of citation, and most projections will of course draw on a longer citation accumulation period). Nor will I extend my reach anywhere near fifty years, but only far enough to equalize the time period involved so that each case enjoys the citation count that my model predicts for a complete thirteen years. Using this methodology, the decisions of the McLachlin Court that will be cited the most frequently are shown in Table 7.

(2d) 451 (providing an earlier explanation and application of this methodology). See also Peter McCormick, *The End of the Charter Revolution* (Toronto: University of Toronto Press) ch 8 [forthcoming in 2014] (making a more ambitious application, differentiating a series of chief justiceships).

39. See "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19:2 JL & Econ 249.
40. "The Citation and Depreciation of U.S. Supreme Court Precedent" (2013) 10:2 J Empirical Legal Stud 325 at 329.
41. Obviously, the counts will more precisely serve this purpose if the time periods over which citation has accumulated are done in terms of months rather than years. This is what has been used for the calculations described in the rest of this Part.

TABLE 7: MOST FREQUENTLY CITED DECISIONS (ACTUAL AND PROJECTED) FOR THE MCLACHLIN COURT

Case	Citation	Delivered by:	Actual Cites	Projected Cites
Dunsmuir v New Brunswick	2008 SCC 9	Bastarache & LeBel	34	70
R v Grant	2009 SCC 32	McLachlin CJ & Charron	24	65
Housen v Nikolaisen	2002 SCC 33	Iacobucci & Major	51	57
Bell ExpressVu Limited Partnership v Rex	2002 SCC 42	Iacobucci	50	56
R v Sharpe	2001 SCC 2	McLachlin CJ	44	49
Canada v Khosa	2009 SCC 12	Binnie	16	40
Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79	2003 SCC 63	Arbour	26	33
Suresh v Canada	2002 SCC 1	By the Court	29	32
R v Malmo-Levine	2003 SCC 74	Gonthier & Binnie	25	32
Dr Q v College of Physicians and Surgeons of British Columbia	2003 SCC 19	McLachlin CJ	26	31
Law Society of New Brunswick v Ryan	2003 SCC 20	Iacobucci	25	30
United States of America v Burns	2001 SCC 7	By the Court	19	29
Canadian Western Bank v Alberta	2007 SCC 22	Binnie & LeBel	16	29

These citation counts might seem low, but remember that they only account for eleven years of actual or projected citations on an unusually flat depreciation curve (the decay rate for citations by the Lamer Court was twice as steep). On this projection methodology, the life-time accumulated citations of the top two cases on the list, and possibly the top four, will eventually exceed one hundred, something that has been done to date by less than a dozen decisions of the Court. The judgment delivery pattern of the top thirteen (again, because of a tie for twelfth spot) is rather different from that of the previous Courts. For one thing, there are more co-authored judgments (by three different pairs of judges). For another, the list includes a pair of By the Court judgments, where

there were none in the two previous Courts' lists. Chief Justice McLachlin's three sole-authored judgments lead the table. Justices Iacobucci and Binnie appear just as often, but only by virtue of co-authorship. Chief Justice McLachlin aside, female judges are not much in evidence, with Justice Arbour's single decision being the only exception.

Against this methodological background, we can generate the data that parallel Table 1 for the Dickson Court and Table 4 for the Lamer Court for eleven (not thirteen) years of cases for the McLachlin Court. This restriction to eleven years also explains why Justices Moldaver, Karakatsanis, and Wagner do not show up on the list: Table 8 presents the data for the fifteen judges who served on the McLachlin Court as of 31 December 2010.

TABLE 8: JUDGMENT DELIVERY PARTICIPATION BY JUDGE: THE MCLACHLIN COURT

	Service in years	Decisions Delivered	Decisions Per Year	Top Tenth Decisions	Top Tenth Per Year	Ratio to all judges
Iacobucci	4.48	42	9.4	9.5	2.12	329%
McLachlin CJ	10.98	85.5	7.8	14	1.28	198%
Arbour	4.48	28.5	6.4	3.5	0.78	121%
Binnie	10.98	78	7.1	8	0.73	113%
Gonthier	3.56	18.5	5.2	2.5	0.7	109%
Bastarache	8.48	52.5	6.2	5.5	0.65	101%
Abella	6.34	31.5	5.0	4	0.63	98%
LeBel	10.98	79.5	7.2	5.5	0.5	78%
Charron	6.34	46	7.3	3	0.47	73%
Major	5.97	48.5	8.1	2.5	0.42	65%
L'Heureux-Dubé	2.48	3	1.2	1	0.40	63%
Deschamps	8.40	35	4.2	2	0.24	37%
Rothstein	4.84	31.5	6.5	1	0.21	32%
Fish	7.41	39.5	5.3	1	0.13	21%
Cromwell	2.02	8.5	4.2	0		
By the Court		35		2		

Once again, jointly authored reasons (a total of sixty-two) have studded the table with fractions, although this time there were no triple-authored decisions. Co-authorship of judgments, and of minority reasons as well, is emerging as a modest but persistent portion of the McLachlin Court's output. If separate concurrences were the identifying mark of the Lamer Court, co-authorships are becoming the identifying mark for the decisions of the McLachlin Court. The overall average number of decisions per judge per year (excluding the 35 By the Court decisions) was lower again at 6.4, down from 8.3 for the Dickson Court, and 7.85 for the Lamer Court. Chief Justice McLachlin, and Justices Binnie and LeBel lead in total judgments delivered; for the top tenth decisions, Justice Iacobucci displaces Justice LeBel. It is still the case that three judges account for nearly half of the important decisions (Chief Justice McLachlin, and Justices Iacobucci and Binnie total 31.5 out of the 64 cases in the top tenth once the 2 By the Court cases are removed).

In overall judgments, women trail their male colleagues by almost a full judgment per year, even though the male/female difference in participation in minority reasons has completely vanished—both write or join minority reasons about 14 per cent of the time. But the difference flips the other way for the more frequently cited decisions, and for the first time the female judges are not just ahead, but *substantially* ahead of their colleagues, enjoying a 13 per cent advantage.

TABLE 9: JUDGMENT PARTICIPATION BY MALE AND FEMALE JUDGES: THE MCLACHLIN COURT

	Service in Years	Judgments Delivered	Judgments Per Year	Top Tenth Decisions	Top Tenth Per Year
All judges	97.74	628	6.43	63	0.64
Male judges	58.72	398.5	6.79	36	0.61
Female judges	39.02	229.5	5.88 86.7%	27	0.69 112.9%

It would seem, then, that this story has come full circle, with female justices initially disadvantaged in the delivery of important decisions on the Dickson Court, closing the gap on the Lamer Court, and finally pulling ahead on the McLachlin Court. In terms of women coming to the table and taking a share of what really matters, as I described the challenge in the introduction, this seems to be the happiest of endings. But there is one further aspect of the matter that needs to be taken into consideration before drawing this conclusion, and that is what we might call the "Chief Justice factor."

V. THE CHIEF JUSTICE FACTOR

As we saw in the previous Part, more important judgments of the Dickson and Lamer Courts were delivered per judge per year by male judges (one of whom was the Chief Justice) than by the female justices, whereas more important judgments of the McLachlin court were delivered per judge per year by female judges (one of whom was the Chief Justice) than by their male colleagues. Before we conclude that the wheel has turned and equal sharing has been achieved, perhaps even exceeded, we should look more closely at the reiterated parenthetical comment in the preceding sentence and ask how much difference it makes that one justice is also the Chief Justice. Is there a Chief Justice factor at work in addition to a gender factor?

Even on the face of the standard descriptions of the judgment assignment process, there is some reason to look for such a factor. If two or more judges volunteer to deliver the judgment, it goes to the senior justice—and the Chief Justice is by definition always the senior justice. (For almost all of the last thirty years, the Chief Justice has also been the longest serving member of the Court, so they would win the ties even without this proviso.) Beyond this, however, it seems reasonable to think that there is an expectation that the Chief Justice will visibly lead the Court by delivering at least a mildly disproportionate share of the highest profile and most controversial decisions, a category that is not identical to but can reasonably be taken as strongly overlapping with my "most frequently cited" criterion.

As the numbers in Part IV showed, Chief Justices have not always led the Court in top tenth judgments per year, but they have always been part of the cluster at the top of the ranking—always one of the handful of judges visibly leading the Court in the cases that cast real shadows. Table 10 isolates the Chief Justices' numbers from those of the other members of the Court and expresses each Chief Justice's top tenth judgments per year as a ratio of the other justices' top tenth judgments per year. That Chief Justice Dickson would have led his Court so strongly, delivering something more than a double share of the major decisions, is perhaps not surprising, and the Chief Justice factor is only slightly less dramatic for Chief Justice Lamer. However, despite her reputation for keeping a lower profile on a more collegial Court, Chief Justice McLachlin dominates her Court on the more important cases every bit as much as did Chief Justice Dickson. The lower numbers for judgments per year for the Lamer Court and especially for the McLachlin Court reflect the declining reserved judgment caseload for the more recent Courts.

TABLE 10: JUDGMENT DELIVERY RATES COMPARED: CHIEF JUSTICES AND OTHER JUSTICES

	Years of Service	Decisions within Top 10%	Top 10 Decisions Per Year of Service	Ratio, CJ to All Others
Dickson CJ	6.20	10.83	1.75	227%
All other members of the Dickson Court	48.48	37.17	0.77	
Lamer CJ	9.52	12	1.26	170%
All other members of the Lamer Court	73.95	55	0.74	
McLachlin CJ	10.98	14	1.28	226%
All other members of the McLachlin Court	86.76	49	0.56	

But if there is a Chief Justice factor, the relative judgment delivery rates that test the Songer hypothesis should be based strictly on comparisons between puisne justice apples, leaving out the Chief Justice oranges. This corrected comparison, presented in Table 11, has a substantial impact across all three chief justiceships. On this measure, female judges are still slightly disadvantaged on the Dickson Court, but the margin of this disadvantage has shrunk from 25 per cent to 13 per cent. On the Lamer Court, this margin is similarly reduced, from 15 per cent to a relatively modest 7 per cent—that is to say, the Chief Justice factor itself accounts for fully one half of the apparent disadvantage of female justices in important judgment assignments for the first fifteen years for which female judges accumulated significant service on the Court.

On the McLachlin Court, however, removing the Chief Justice from the count not only turns the apparent positive advantage for female judges back into the same kind of disadvantage they have experienced in the past, but also suggests that the margin of this disadvantage is larger than it has ever been. This is despite the fact that the ratio in total years of service, although still tipped strongly towards male judges, is significantly less so on the McLachlin Court than ever before. Furthermore, the McLachlin Court includes a larger number of female judges, a fact that makes an idiosyncratic or personality-driven explanation less plausible. The McLachlin Court has had more female puisne justices than ever before, and they have accumulated a larger share of the total years of service than ever before. But so far there is no indication that they are getting proportionately more of the judgments. If anything, the contrary is true.

TABLE 11: GENDER DIFFERENCES IN MAJOR DECISION DELIVERY, EXCLUDING THE CHIEF JUSTICES

	Years of Service	Decisions within Top 10%	Top 10% Decisions Per Year Served	Ratio, Females to Males
Dickson Court, male judges	37.82	29.83	0.79	
Dickson Court, female judges	10.66	7.33	0.69	87.2%
Lamer Court, male judges	54.09	41	0.76	
Lamer Court, female judges	19.86	14	0.70	93.0%
McLachlin Court, male judges	58.72	35.5	0.60	
McLachlin Court, female judges	28.04	13.5	0.48	79.6%

VI. DOES IT MATTER?

It might be objected that these differences are, in the end, rather small. After all, one might say, just move one or two major decisions from the average male judge to the average female judge every year or so, and the apparent inequality is exorcised. Indeed, move three or four, and the apparent discrimination is reversed. What can be so significant about three or four decisions on a court that once handed down a hundred decisions a year, and even now delivers annually five or six dozen?

This question grossly understates the problem. We are not talking about just three more decisions here or two fewer decisions there, but two or three for every single judge; the notional "average male judge" or "average female judge" both stand in for a much longer line of specific individuals. Nor are we talking about routine cases or even about normal decisions, but about the top tenth of the Court's caseload, amounting to about eight cases per year for the Dickson Court, seven per year for the Lamer Court, and an even scarcer six per year for the McLachlin Court. There is nothing small or inconsequential about hypothetically shuffling one or more of these from one judge to another, because each top tenth case is a trophy that has been realized after surviving both the initial judgment assignment gauntlet and the possibility of losing the majority on a swing within the panel. For the individual judge, a puisne justice, this is an opportunity that does not come as often as once per year. Coming out behind by that notional fraction of a judgment per average judge per year is, over a number of years, the functional equivalent of being obliged to leave the Court early, of having a career

cut short. Fewer decisions per year means having to invest more years to get the same return, and in this context, apparently small differences really matter.

This difference can be quantified: On the Dickson Court, the average puisne justice delivered 0.77 major judgments per year. Since the average career for a Court justice since 1949 has been about thirteen years, this average number implies a total of ten such judgments over the normal career. To achieve this number would have taken the average male judge on that Court twelve years and eight months, the average female judge fourteen years and six months. On the Lamer Court, this number had fallen slightly to 9.6 major judgments over the normal career, still taking the average male judge the same twelve years and eight months but the average female judge thirteen years and nine months. On the McLachlin Court, the 0.56 major judgments per year for each judge other than the Chief Justice suggest a normal career total of only 7.25 judgments, which would take the average male judge twelve years and two months, but the average female judge fifteen years and two months.

I do not think it is fanciful to describe a judicial career in terms of the major judgments delivered. I have had the opportunity to speak to four justices or former justices of the Court, and when I asked them which of their judgments would be remembered and cited the longest, they had not the slightest hesitation in coming up with two or three prime candidates.[42] Judges contribute to many decisions through their participation on panels, through the circulate-and-revise process, and through their minority reasons, but they are generally remembered for the majority judgments that they delivered on behalf of the Court.

VII. CAVEATS FOR THIS STUDY

Of necessity, focussing the spotlight on any one thing involves leaving other things in the shadows, and in the immediate context there are several things located just off center stage that should not be ignored.

First, as emphasized from the beginning, citation frequency (even when it is adjusted by the decay curve to allow fair treatment of more recent decisions) is only one measure of decision importance, and by no means a perfect one. Were someone to suggest that a particular Court decision was important even though it was seldom cited, that suggestion would require some solid argument to support it, but it would not be ridiculous on its face.[43] That said, to concede a possible

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42. Intriguingly, when I asked them what set of reasons they were most proud of, they typically suggested a dissent.
43. At one time, I tried to persuade a former dean of a central Canadian law school to lend his name and letterhead to a major survey of legal professionals asking them to identify the

set of "important but seldom cited" cases, and possibly an additional (somewhat less credible) offsetting set of "unimportant even though frequently cited" cases, would compromise my analysis only should there be some systematic connection between the gender of the judge and either set of cases, which seems unlikely.

Second, my cut-off point of the top ten per cent (*i.e.*, top tenth) is both arbitrary and restrictive, and a more generous criterion (*e.g.*, top 25 per cent) might yield a rather different result. An earlier version of this article attempted a "top quarter" to go along with the top tenth as two parallel strands of analysis, but commentators found it ponderous and awkward. The narrow focus, though, seems justified; it is entirely reasonable to suggest that, on average, the Court hands down a half dozen or so decisions every year that stand out for their enduring significance, and that it is worth keeping track of which judges dominate judgment delivery for this top fraction. This is all the more so because the drop-off in citation frequencies is so pronounced—only staying with top tenth ensures a list of cases whose subsequent citation counts measure in the dozens.[44] Since my method already implies that the most frequently cited case and the one at the very bottom of the top 10 per cent are both in some sense equal for my purposes, I am reluctant to water the wine any further.

Third, my measure of the jurisprudential contribution of the various judges is based on the delivery of the reasons for judgment in frequently cited decisions, but the other judges who sign on to the judgment of the Court also play a part in the drafting of reasons through a circulation-and-revision process that, on all indications, is taken very seriously. Writing the reasons yourself might be the best way to ensure that your favoured ideas appear within the reasons for judgment, but it is not the only way. For that matter, writing minority reasons can be more influential than some might think; at one point during the early Lamer Court, about one citation in every nine that the Court made to its own prior decisions was to minority reasons.[45] For the current McLachlin Court, that frequency is down by half. Justice Wilson's frequently cited (and quoted) separate concurrence in *R v Morgentaler*[46] is the most striking, but far from the only, example.

Court's most important decisions, mirroring similar studies in the United States, but he declined. Such a second angle on decision importance would be useful, although I suspect it would largely overlap with the citation frequency set, creating a Venn diagram with a very large centre and two small, albeit interesting, wings.

44. For the same reason, I work with top tenth for the chief justiceship rather than the top tenth for each separate year, because, like Biblical Pharaonic Egypt, the Court clearly has "fat" years and "lean" years in terms of how memorable its delivered decisions are.
45. See Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949-1996" (2002) 81:2 Can Bar Rev 369.
46. [1988] 1 SCR 30, 44 DLR (4th) 385.

Fourth, in this study, judgment delivery rates are expressed on a "per year of service" basis. They could equally have been computed "per panel appearance"—judge-by-judge variations in this respect are not significant so the results would not change,[47] although the "per year" figure communicates the differences in a less abstract way. The advantage of working from panel appearances is that this number could—where the "per year" number could not—be adjusted for those panel appearances that result in the writing or joining of minority reasons, thus implying a reduced availability for the judgment assignment.

The methodological problem here is that the "per year" approach assumes that splits in the panel always come *before* the assignment; but what about the possibility that the splits come later, that some decisions to write or to join minority reasons come *after* the judgment assignment? This may happen because of details or choices within the majority reasons as they are drafted, or it may be that being passed over for majority reasons (especially if it happens repeatedly) may itself contribute to the decision to write minority reasons.[48] I strongly suspect that most splits emerge at the post-hearing conference, but I also suspect that the circulate-and-revise process is sufficiently real and engaged that a non-trivial proportion emerge later in the process. If an attempt to persuade and/or negotiate from within the majority block is not sufficiently successful, minority reasons may be the consequence. Working from panel appearances, and adjusting that for minority reason participation, may "over-exclude" for these late-emerging fragmentations and simultaneously "over-include" for initial panel divisions that are overcome by the majority's persuasive drafting and effective responses.

Fifth, and rather more seriously, the numbers for the participation of female judges, especially on the earlier Courts, are dominated by a small set of judges: Justices Wilson, L'Heureux-Dubé, and McLachlin. As a result, it is hard to distinguish between a systematic institutional product on the one hand and the play of unique personality effects on the other. In addition, the smaller the

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47. C L Ostberg, Matthew E Wetstein, and Craig R Ducat suggest that first-year justices are assigned fewer panels, but this is a short-term effect, matched by a comparable drop-off in panel appearances after the eighth or ninth year. See "Acclimation Effects on the Supreme Court of Canada: A Cross-Cultural Examination of Judicial Folklore" (2003) 84:3 Soc Sci Q 704 at 713-15. My own figures on "reserved panel appearances per hundred days of service" show some judge-to-judge variation, but nothing systemic, and never to the extent that the accumulated numbers for female judges and male judges are not within a plus or minus 2 per cent range.

48. Years ago, Slotnick suggested a kind of vicious circle: Judges who frequently write minority reasons may pay an implicit tax for this individualism by getting less than their notional share of the judgments, even when they do join the majority. *Supra* note 34.

number of judges involved, the larger the possibility and the potential magnitude of such distortion. These three judges combined account for more than 60 per cent of the person-years of judicial service accumulated by all female judges up to the end of 2011. Chief Justice McLachlin alone accounts for almost one third of the total, divided evenly between her service as a puisne judge and as Chief Justice, and Justice L'Heureux-Dubé for a fifth of the total.

Sixth, the women other than these three have either served for relatively short terms (Justice Arbour) or have been appointed fairly recently—within the period considered in this article, only Justice Deschamps had more than eight years of service, and only Justices Abella and Charron joined her with more than six. But seniority is one of the factors mentioned in the standard accounts of Court decision making as an element in the assignment of the majority judgment. To be sure, it is only one element among several, and it is not described in a way that allows any assessment of its relative weight; but to the extent that it drives the process at all, the seniority element would clearly work against female judges as a group and tilt the count towards their male colleagues. The next decade will provide a good test in this regard: When Chief Justice McLachlin retires from the Court in 2018 (assuming she serves until the age of seventy-five), she will leave an unusually junior Court of which only a single member will have more than ten years of experience, and that person (Justice Abella) will be a woman.[49]

These are grains of salt with which the general findings must be taken, and they suggest that these findings should be treated as indicative rather than definitive, suggestive rather than conclusive. But unless all cut heavily the same way, with citability, personality, and seniority all having the maximum likely impact and in the same direction, they will at most qualify rather than refute the general suggestion that female judges have yet to achieve full participation in the Court's most important activities.

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49. The most obvious way to talk about seniority is of course "years of service"—a senior judge is one who has served on the Court for (say) ten years. But in terms of judgment assignment, this is not the operational definition, because the real question is how many judges are *more* senior, and this is highly variable. After six full years of service, Justice La Forest (appointed in 1985) was the third most senior on the Court; after an identical six years, Justice Chouinard (appointed in 1979) was the fifth most senior; but after the same length of service, Justice Iacobucci (appointed in 1991) was still only the eighth most senior. The generalization "the longer you serve, the more senior you become" is only true if it is understood in a way that is not too mechanical or automatic.

VIII. CONCLUSION

In this article, I have looked at the assignment of reasons for judgment on the Court over the last three chief justiceships, with specific reference to the relative rate of assignments to male and female judges.

I have tried to distinguish between the total run of decisions and the more important ones—the top tenth—by using the criterion of subsequent citation by the Court itself. This is not a perfect differentiator, but it is both credible and objective, and it picks up on what is certainly one of the major identifiers of enduring significance. I have used this criterion even for the ongoing McLachlin chief justiceship by drawing on a broader theory of judicial citation that posits a constant decay rate in citation frequency.

Having identified a lower rate of participation on major decisions for female judges on both the Dickson and Lamer Courts, I noted an apparent reversal of this pattern under Chief Justice McLachlin. However, I then explored a Chief Justice factor in judgment assignment, on the not unlikely hypothesis that for institutional reasons Chief Justices deliver more than their notional one-ninth share of judgments, especially for the more important decisions. Adjusting for this factor (*i.e.*, recalculating with the Chief Justices removed from the mix) not only restored the male/female gap, but suggested that it is more robust than ever.

The persistence of this pattern over three chief justiceships—the third Chief Justice a woman—suggests that there is more to this than the casual byplay of idiosyncratic personalities; something that may be structural and enduring, although I have identified other considerations that suggest that there may be factors at play other than gender alone.

To return to my opening question: Now that women are receiving an increasing share of the seats on the Court, can we conclude with confidence that they have been admitted to full participation, with a mix of judgments—including the more significant decisions—that is fully comparable to their male colleagues? I would have to suggest that the answer is no.